Supreme Court, U.S.
FILED

02 743 NOV 12 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

DAVID McMAHON,

Petitioner,

v.

ALBANY UNIFIED SCHOOL DISTRICT, JOE DALE HUDSON, ALAN RIFFER, DIANNE McNENNY, MARSHA SKINNER, and PEGGY THOMSEN,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

WALTER K. PYLE
Counsel of Record
2039 Shattuck Avenue,
Suite 202
Berkeley, CA 94704-1116
(510) 849-4424

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

42 pp

QUESTIONS PRESENTED

1. Does due process of law prohibit an appellate court from deciding a case on the basis of an issue not briefed or argued by the parties, without first giving notice and an opportunity to brief the issue?

2. The recognized speaker at a school board meeting was expressing his views on public issues. To illustrate his point about the extent of the problem of litter caused by students, he spread out a tarp and emptied onto it papers and bottles he had collected near the school. A board member, without any request to petitioner to cease his conduct, declared that his conduct was "absolutely inappropriate," directed the school superintendent to call the police, and the board adjourned the meeting. Petitioner was then arrested.

Does the First Amendment in such circumstances permit the arrest of the recognized speaker at a public meeting without a prior warning and request to the speaker to cease his actions?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
I. THE PROCESS WHEREBY PETITIONER'S APPEAL WAS DECIDED ON AN ISSUE RAISED ON THE COURT'S OWN INITIATIVE, AND NOT BRIEFED OR OTHERWISE ADDRESSED BY THE PARTIES, DEPRIVED PETITIONER OF DUE PROCESS OF LAW	6
II. THOUSANDS OF PERSONS SEEK TO EXPRESS THEIR VIEWS TO LOCAL GOVERNMENTAL AGENCIES. THIS COURT SHOULD ADOPT A RULE REQUIRING THAT BEFORE A PERSON ENGAGING IN EXPRESSIVE CONDUCT AT A PUBLIC MEETING IS SUBJECT TO ARREST, HE MUST BE REQUESTED TO CEASE HIS CONDUCT	10
A. Petitioner's Actions Constituted "Core" Political Speech	11
B. The Board Meeting Was a Public Forum in the Traditional Sense	12
C. Petitioner's Actions Constituted Protected "Expressive Conduct."	12

TABLE OF CONTENTS – Continued

Page

D. Ideas Need Not Be Expressed Quietly, or With Good Taste or Good Manners to Gain the Protection of the First Amendment 13

E. There Is a Need for a More Definite Test to Set the Bounds of Permissible Conduct in Public Meetings 14

F. A Modest Proposal: This Court Should Adopt a Test Specific to Public Meetings, Which Would Require Notice to the "Disturber" That He Is Out of Order, and a Request to Curtail His Activities 16

G. The Need for Review 19

CONCLUSION 20

APPENDIX A – Opinion of the California Court of Appeal ..... App. 1

APPENDIX B – Order of the Alameda County Superior Court Granting Partial Summary Judgment ..... App. 12

APPENDIX C – Denial of Review by the California Supreme Court ..... App. 15

APPENDIX D – Denial of Petition for Writ of Mandate by the California Supreme Court ..... App. 16

TABLE OF AUTHORITIES

Page

CASES

Boos v. Barry, 485 U.S. 312 (1988) 10, 13

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 7

Cole v. Arkansas, 333 U.S. 196 (1948) 6, 7

Cox v. Louisiana, 379 U.S. 536 (1965) 13

Dubner v. City and County of San Francisco, 266 F.3d 959 (9th Cir. 2001) 14

Edwards v. South Carolina, 372 U.S. 229 (1963) 14

In re Kay, 1 Cal. 3d 930, 83 Cal. Rptr. 686, 464 P.2d 142 (1970) 17

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 8

Lankford v. Idaho, 500 U.S. 110 (1991) 8

Madison School District v. Wisconsin Emp. Rel. Comm'n, 429 U.S. 167 (1976) 12

N.A.A.C.P. v. Claibourne Hardware Co., 458 U.S. 886 (1982) 11

People v. Malone, 156 App. Div. 10, 29 N.Y. Crim. 325, 141 N.Y.S. 149 (1913) 18

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 11

San Diego Unified Port v. U.S. Citizens Patrol, 63 Cal. App. 4th 964 (1998) 13

Spence v. Washington, 418 U.S. 405 (1974) 13

Terminiello v. Chicago, 337 U.S. 1 (1949) 13

Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) 10, 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Grace, 461 U.S. 171 (1983).....16

United States v. O'Brien, 391 U.S. 367 (1968).....14, 16

CALIFORNIA STATUTES

Penal Code § 403.....10

Penal Code § 836 4

Penal Code § 837 4

UNITED STATES CONSTITUTION

First Amendment.....*passim*

Fourteenth Amendment..... 2

STATUTES AND RULES

28 U.S.C. §1257..... 2

Rule 13.1, Rules of the United States Supreme Court..... 2

PETITION FOR WRIT OF CERTIORARI

DAVID McMAHON respectfully petitions for a writ of certiorari to the California Court of Appeal to review its decision affirming the dismissal of certain defendants and certain claims arising out of his arrest while he was addressing the school board.

OPINION BELOW

The memorandum decision of the California Court of Appeal appears as Appendix A, and is unreported. The order of the California Superior Court of Alameda County, granting partial summary judgment against petitioner, appears as Appendix B, and is unreported. The order by the California Supreme Court denying discretionary review appears as Appendix C, and is unreported. The order by the California Supreme Court denying a petition for a writ of mandate appears as Appendix D, and is unreported.

JURISDICTION

Petitioner sought review of the decision by the California Court of Appeal through both a petition for discretionary review and by a petition for a writ of mandate to direct the Court of Appeal to grant a rehearing. The California Supreme Court denied discretionary review on August 14, 2002. On the same date, by separate order, the court denied the petition for a writ of mandate. This petition is filed within 90 days of

those orders, and is timely pursuant to Rule 13.1 of this Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State where a right is claimed by petitioner under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

Congress Shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner David McMahon lived with his wife and two young sons across from the local high school. He had spoken before at school board meetings in attempts to alleviate neighborhood traffic and to get the board to act to reduce the amount of food wrappers and other trash discarded by students in the neighborhood.

On April 30, 1996, the board not having taken significant action in response to his earlier requests, he again addressed the board at a meeting during the period allocated for public comment. When the chair granted him the floor, he discussed earthquake safety, traffic, and sought to present to the board a petition he had circulated in the neighborhood, relating to traffic and asking that the board provide for daily removal of litter deposited in the neighborhood by the students.

To illustrate his point about the problem of student-generated trash, he laid down a tarp, took a plastic bag of trash he had collected around his neighborhood, and emptied it out. The "trash" was described by Craig Boyan, the school principal, as "papers, perhaps bottles." A police officer, Sgt. Clemons, described it as "[b]ottles, paper cups, trash." Beverly Fusier, the secretary to the school superintendent, described it as "wadded up pieces of paper."

At that point a board member directed the school superintendent to call the police, commenting that "this is an absolutely inappropriate activity to do in a schoolroom," and moved to adjourn the meeting. The board immediately adjourned and awaited arrival of the police.

The police, however, refused to arrest petitioner, saying he was not committing a crime, and to arrest for a

misdemeanor under California law, the offense must be committed in the presence of the person making the arrest. The school superintendent thereupon made a citizen's arrest of petitioner.[1]

After plaintiff had been arrested, the superintendent (and others) picked up the trash and disposed of it.

No charges were ever filed against petitioner.

Petitioner filed a suit for (among other things) false arrest and violation of his civil rights under California's Civil Rights Statute. Defendants were the School District, the Superintendent, and the members of the School Board.

The Alameda County Superior Court granted partial summary judgment against petitioner. On the false arrest claim, the court upheld petitioner's claim against the superintendent who had arrested him and the board member who had directed the superintendent to call the

---

[1] In California, statutes provide that a warrantless arrest for a misdemeanor can be made only if the offense is committed in the arresting person's presence. Calif. Penal Code § 836 [arrest by peace officer]; § 837 [citizen's arrest].

The superintendent originally told the police, when they would not arrest petitioner, that before the board adjourned the meeting, they had tried to get petitioner to stop speaking, but petitioner refused to give up the microphone. The police told him that if that had happened, there might be grounds to arrest petitioner for disrupting a public meeting, but nothing like that had taken place in their presence, so if the Superintendent insisted on an arrest, he would have to make a citizen's arrest on his own.

Later (after petitioner obtained a copy of the official tape recording of the meeting), the superintendent conceded that the board had, in fact, never made any request to petitioner to relinquish the microphone, and this theory for justification of the arrest was abandoned.

police, but dismissed the other board members on the ground that they were not closely enough connected with the arrest. The court also granted summary judgment on petitioner's claim under California's civil rights statute, on the grounds that the state statute required a plaintiff to be a member of a "protected class," i.e., sex, race, etc.; a claim of a First Amendment violation was not enough. The court also dismissed petitioner's claim for a declaratory judgment defining the respective rights of petitioner and the school board at public meetings.

Petitioner appealed, raising three issues:

(1) Whether the dismissed board members were liable as co-conspirators or aiders and abetters;

(2) Whether the California civil rights statute permitted suit for violation of petitioner's constitutional rights under California law; and

(3) Whether California's open meetings statutes authorized declaratory relief to declare the rights of the parties relating to conduct at board meetings.

The California Court of Appeal did not decide the first two issues.

Instead, the court affirmed the grant of summary judgment on the ground that petitioner's arrest was justified as a matter of law, and that *nobody* was liable for a violation of his rights.

Neither party had briefed that issue; indeed, the issue was being litigated in a related appeal pending before the same division of the same court from a later judgment.

After petitioner's petition for rehearing was denied by the Court of Appeal, the California Supreme Court denied discretionary review and denied a petition seeking an order mandating the Court of Appeal to grant a rehearing.

This petition followed.

REASONS FOR GRANTING THE PETITION

I.

THE PROCESS WHEREBY PETITIONER'S APPEAL WAS DECIDED ON AN ISSUE RAISED ON THE COURT'S OWN INITIATIVE, AND NOT BRIEFED OR OTHERWISE ADDRESSED BY THE PARTIES, DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

The California court's action in disposing of petitioner's appeal without giving petitioner an opportunity to contest the ground for affirming the judgment raised by the court on its own initiative conflicts with relevant decisions of this Court.

Due process of law demands that a party be afforded an opportunity to address an issue before an appellate court decides that issue against him.

The case at bar is reminiscent of *Cole v. Arkansas*, 333 U.S. 196 (1948), where the defendants were tried and convicted of violating § 2 of a state statute. On appeal they challenged the constitutional validity of the statute on First Amendment grounds. *Id.* at 202, n. 5. Without passing on that question, the state supreme court sustained their convictions on the ground that the record showed a violation of § 1 of the same statute. This Court

reversed, stating, "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.* at 202.

Cole, of course, was a criminal case. Do such principles apply to a civil case like this one?

Yes, the same constitutional principles apply to a civil case. In *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930), the Missouri Supreme Court had affirmed the dismissal of a complaint to enjoin the collection of certain taxes on the ground that the plaintiff had not first sought administrative review of the issue – a ground which had neither been asserted by the defendant nor argued before the court. This Court reversed, stating that the plaintiff was not "accorded due process in the primary sense," that is, the plaintiff had not "had an opportunity to present its case and be heard in its support." *Id.* at 681. The court stated the rule of law dictated by the Fourteenth Amendment:

> Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. *Id.* at 682.

In *Brinkerhoff-Faris*, if the judgment had been allowed to stand, deprivation of the plaintiff's rights would have been accomplished without the plaintiff ever having had the opportunity to defend against the court's judgment. *Id.* at 679. The same result is imminent here, too.

The concept that a litigant has the right to notice and an opportunity to be heard is also fundamental to the

People's confidence in their government and the reputation of the courts. In *Lankford v. Idaho*, 500 U.S. 110 (1991), the state had filed a statement that they would not seek the death penalty, and at the sentencing hearing the possibility of a death sentence was not discussed. The judge imposed a sentence of death, and Lankford appealed. On certiorari, this court noted that there was technically nothing which had prevented the defendant from arguing against imposition of the death penalty, but it answered that contention by emphasizing the importance that the Court attaches to the concept of "fair notice as the bedrock of any constitutionally fair procedure." *Id.* at 120-121. In support of this point, the Court quoted a portion of Mr. Justice Frankfurter's opinion in a civil case, *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 171-172 (1951):

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

That confidence cannot be maintained by decisions reached in the manner present in this case.

The case at bar demonstrates the ease with which a citizen's constitutional rights can be lost when matters of constitutional significance are left solely to State governmental bodies, which, absent oversight by a higher authority, would be free to disregard the constitution. In a scenario which could have been written by Kafka, petitioner's First Amendment rights were taken away by one governmental agency, and, when he sought to rectify the

loss through appeal to another governmental agency, that agency deprived him of his right to have his appeal heard.

The reasons why an opportunity to be heard is so important is illustrated by the fact that the California Court of Appeal based its decision on its conclusion that the board members thought the litter was potentially hazardous. Although defendants made that argument connection with the motion for summary judgment, the trial court did not consider it in ruling on the motion. Significantly, defendants later abandoned this theory as a justification for the arrest, probably because it had been called to their attention in subsequent proceedings that the tape recording of the meeting showed that petitioner made no statement about the contents of the trash until after the board had adjourned the meeting and had left the room. Had petitioner been given an opportunity to be heard, this fact could have been brought to the attention of the court. As it was, petitioner's case was decided not only on an issue that was not argued, but upon a factually erroneous theory as well.

The need for review by this court is particularly needed in a civil case such as this one. In a criminal case, the defendant deprived of due process of law still has recourse to the federal courts by way of a federal habeas corpus petition. The civil litigant does not.

II.

THOUSANDS OF PERSONS SEEK TO EXPRESS THEIR VIEWS TO LOCAL GOVERNMENTAL AGENCIES. THIS COURT SHOULD ADOPT A RULE REQUIRING THAT BEFORE A PERSON ENGAGING IN EXPRESSIVE CONDUCT AT A PUBLIC MEETING IS SUBJECT TO ARREST, HE MUST BE REQUESTED TO CEASE HIS CONDUCT.

Each year thousands of citizens speak out on public issues before their city councils, planning commissions and school boards. Doubtless many local officials view their comments as unnecessary, divisive, and unreasonable.

Significantly, the Framers of the Constitution did not grant to local politicians the power to grant or deny the right to speak in such public fora, or the right to petition the government for redress of grievances. Nor did the Framers premise the right to speak out on whether local officials consider the speech to be "inappropriate," or even when they find the speech insulting or even outrageous. *Boos v. Barry*, 485 U.S. 312, 322 (1988) [Outrageous speech must be tolerated in order to provide adequate "breathing space" for First Amendment freedoms.]; *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969) ["But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."].

In deciding the case, the California Court of Appeal concluded that petitioner's actions were sufficient to constitute, *as a matter of law*, see App. 5, the unlawful disturbance of a public meeting, a violation of § 403 of the California Penal Code.

The California appellate court's decision is contrary to this Court's First Amendment jurisprudence.

There is a logical reason the First Amendment was placed at the head of the line. The Framers recognized it as one of the fundamental foundations of our system of government, which would allow the people to speak freely, of controversial, even unpopular, subjects, without fear of reprisal by their government, and which would allow the people to petition their government for redress of their grievances without fear or reprisal. It is that concern for freedom of expression which chiefly distinguishes our country from other countries in the world.

A.

Petitioner's Actions Constituted "Core" Political Speech.

The First Amendment decisions of this court have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 422 (1992) (Sevens, J., concurring).

"Political" speech includes speech on public issues. This Court stated in *N.A.A.C.P. v. Claibourne Hardware Co.*, 458 U.S. 886 (1982):

> This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467. "[S]peech concerning public affairs is more than

> self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270.

Core political speech cannot depend on popularity of its content to preserve it. Core political speech survives only because of the First Amendment principles proclaimed by this court.

The decision of the California appellate court endangers those fundamental principles.

B.

The Board Meeting Was a Public Forum in the Traditional Sense.

A school board meeting at which the public is permitted to express ideas is *per se* a public forum. *Madison School District v. Wisconsin Emp. Rel. Comm'n*, 429 U.S. 167, 178-179 (1976) (Brennan, J., concurring).

C.

Petitioner's Actions Constituted Protected "Expressive Conduct."

The First Amendment protects not only pure speech, but expressive conduct as well. This Court has stated that non-verbal conduct is sufficiently "expressive" for First Amendment purposes if the actor intended his conduct "to convey a particularized message" within a context where

the likelihood was great that the message would be understood by those who viewed it. *Spence v. Washington*, 418 U.S. 405, 410-411 (1974). Petitioner was clearly doing that here. The Court of Appeal recognized that plaintiff sought by his conduct to "illustrate his point" that he was making in his speech to the Board. (App. 2 Exhibit B, Typed opn., p. 1.)

D.

Ideas Need Not Be Expressed Quietly, or With Good Taste or Good Manners to Gain the Protection of the First Amendment.

The First Amendment encourages an exchange of ideas, not just an expression of the ideas of the organizers of a public meeting. "The right to free speech is constitutionally protected from censorship by hostile reaction, sometimes referred to in case law as a 'heckler's veto.'" *San Diego Unified Port v. U.S. Citizens Patrol*, 63 Cal. App. 4th 964, 970 (1998).

This Court has long and consistently recognized similar principles. See, e. g., *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) [Holding ordinance prohibiting violation of public peace and decorum unconstitutional; free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."]; *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) [" . . . constitutional rights may not be denied simply because of hostility to their assertion or exercise"]; *Boos v. Barry*, 485 U.S. 312, 322 (1988) ["[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"]; *Tinker v. Des Moines School*

Dist., 393 U.S. 503, 508 (1969) ["But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."].

E.

There Is a Need for a More Definite Test to Set the Bounds of Permissible Conduct in Public Meetings.

Earlier cases looked to whether expressive conduct created a "clear and present danger of a serious substantive evil" which rose above public annoyance or unrest. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) [picketing, singing, stamping and clapping]. California still applies this test in matters involving potential violence or threats to public safety. See *Dubner v. City and County of San Francisco*, 266 F.3d 959, 967 (9th Cir. 2001).

In *United States v. O'Brien*, 391 U.S. 367 (1968) this court created a more definite, four-pronged test which, in effect, applied the "time, place or manner" restrictions, without regard to content, to symbolic speech.

Mr. O'Brien claimed the burning of his draft card was protected symbolic speech, and this court assumed for the sake of argument that his actions were sufficiently communicative in nature to implicate the First Amendment. 391 U.S. at 376. But, said the court, a governmental interest, if it was strong enough, might justify incidental limitations on First Amendment freedoms. *Ibid.*

The court then set out a four-part test to determine when a governmental interest sufficiently justifies the regulation of expressive conduct. Governmental regulation is justified if:

(1) it is within the constitutional power of the Government;

(2) it furthers an important governmental interest;

(3) the governmental interest is unrelated to suppression of free expression; and

(4) the incidental restriction on the First Amendment "is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

Turning to the case at bar, the inquiry is, what is the governmental regulation, and what is the important governmental interest at stake?

The *regulation* was presumably the school board's efforts to prevent petitioner from displaying the litter he had collected from the neighborhood.

The governmental *interest* seems to be the interest in keeping papers, bottles and paper cups out of a meeting room that will also be used by pupils the following day. But is this an "important" governmental interest? It would seem not, at least under the circumstances of the case here; it is common to use school rooms as meeting rooms, and meeting participants sometimes drop food wrappers or paper cups on the floor, without causing the wheels of government to come to a halt. Moreover, here the defendants allowed the litter to remain on the floor until petitioner was arrested, and then simply picked it up and put it in a trash can.

Even if one assumes that the regulation is unrelated to suppression of expression, the facts of the case seem to place the fourth prong far short of its objective. The "incidental restriction" on petitioner's expressive conduct

here was the arrest of petitioner. Significantly, the arrest did not advance the governmental interest of keeping papers and cups off the floor; if anything, it prolonged the presence of the litter. And when one asks if the defendants' choice of arrest as the remedy was a restriction that was "no greater than is essential" to the furtherance of the interest of keeping litter off the floor, it is clear that the arrest was a restriction on speech far in excess of what was required. A simple request to petitioner to conclude his remarks and pick up his trash would have done the job.

Thus the arrest of petitioner did not meet the test set forth in *O'Brien*.

F.

A Modest Proposal: This Court Should Adopt a Test Specific to Public Meetings, Which Would Require Notice to the "Disturber" That He Is Out of Order, and a Request to Curtail His Activities.

The four-part test in *O'Brien*, however, is not easily applied to all situations involving expressive conduct which may be protected by the First Amendment. Thus after *O'Brien* we see slightly different expressions by this court to the effect that restrictions on expressive conduct in public forums must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States v. Grace,* 461 U.S. 171, 177 (1982).

We submit that where the government attempts to restrict expressive conduct in the context of a public meeting such as the one here, this court should promulgate a test which is more appropriate to that particular

context. More specifically, we propose that where, in the context of a public meeting, the government claims that there has been a breach of the peace, or disorderly conduct, or conduct disturbing a public meeting, in order to ensure that the arrest of a speaker or demonstrator is not used to suppress expression, this court should adopt the rule that the alleged "disturber" must first be given a warning that he is out of order and requested to curtail his conduct.

Two cases illustrate this approach.

California adopted such a rule in *In re Kay*, 1 Cal. 3d 930, 83 Cal. Rptr. 686, 464 P.2d 142 (1970). The government has a legitimate interest in the orderly conduct of public meetings, but this interest must be reconciled with the people's right to express disapproval of their government's policies, and the right to petition for redress of their grievances. The California court therefore required that for an arrest to be justified, it must be shown that the person arrested had substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known. 1 Cal. 3d at 943. The mere fact that persons at the meeting were "disturbed" by the protest is beside the point. 1 Cal. 3d at 937.

People v. Malone, 156 App. Div. 10, 29 N.Y. Crim. 325, 141 N.Y.S. 149 (1913) reached the same result, but without reference to the First Amendment.

In *Malone*, Governor Wilson had spoken for several minutes at a political rally, when a woman stood up and called the speaker by name, which instantly created an uproar. 141 N.Y.S. at 150. When the governor asked her, "What is it, madam?" she demanded to know the governor's position of women's suffrage. The governor replied that he was there to talk about other matters, and said he declined to be interrupted further, and the chairman of the meeting asked the woman to resume her seat. The woman continued asking questions, and the uproar continued until she was ejected. *Ibid.*

The *Malone* court stated that the woman's unexpected remarks about women's suffrage did create an uproar, and undoubtedly "disturbed" the meeting. Importantly, however, the court said the initial reaction by the audience was *not* a disturbance which was the woman's doing. 141 N.Y.S. at 152. Rather, the disturbance was the doing of the audience itself, for which the speaker was not responsible in the eyes of the law. *Ibid.*

Yet the *Malone* court found that the woman *was* guilty of disturbing the meeting. The circumstance which changed lawful conduct into unlawful conduct was that *the chairman asked the woman to cease her conduct and sit down.* Even though her initial conduct which resulted in a disturbance was lawful, explained the court, "[S]he was out of order and a disturber as soon as [Governor Wilson] had refused to discuss the question any further and the chairman had requested her to cease and to sit down." 141 N.Y.S. at p. 152.

It is not difficult to understand why courts in New York and California should both conclude that a request to curtail one's conduct is a prerequisite to a lawful arrest. The California Supreme Court tells us that the reason is a practical one: "Meeting rules are rarely carefully spelled out or well known to the audience." *Kay*, 1 Cal. 3d. at 945, fn. 12. Even when the rules are clear, "officials of a meeting commonly suspend or simply ignore such rules" in order to expedite the meeting. *Ibid.* Thus it is not unusual for there to be a considerable degree of uncertainty as to just what meeting rules or customs are being enforced, and a person should not be required to speculate where his First Amendment rights begin or end. A request and warning ensures the proper balance between order and freedom of expression. When no such requirement is observed by meeting officials, individuals are forced to speculate what conduct is criminal, and "steer far wider of the unlawful zone" by avoiding controversial matters. *In re Kay*, *supra*, at 945. That, of course, is the suppression of expression.

G.

The Need for Review.

Thousands, perhaps millions, of persons address their governmental bodies, mostly at local levels, every year.

But the California Court of Appeal's decision gives a governmental agency carte blanche to act as a roving commission to hear or not hear speakers, to arbitrarily arrest whom they, in their sole discretion, deem to be engaging in "inappropriate" conduct, with no announced standards to guide them or their speakers. Instead they have the power to arrest without warning. To intimidate

others who might offend – or might fear they might offend – the sensibilities of their government. Those who do not wish to risk arrest are sentenced to silence, or, at best, tepid voices of approval of whatever actions the governmental body might take.

Unbridled discretion in the hands of a government agency is the antithesis of freedom of speech. Adoption of a rule requiring a warning and a request to the person whose activities meeting officials wish to curtail strikes a proper balance between order and freedom of expression.

CONCLUSION

We ask that the court grant the petition for certiorari.

Respectfully submitted,

WALTER K. PYLE
2039 Shattuck Avenue,
Suite 202
Berkeley, CA 94704-1116
(510) 849-4424

Attorney for Petitioner

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DAVID McMAHON, Plaintiff and Appellant. v. ALAN RIFFER et al., Defendants and Respondents.	A094883 (Alameda County Super. Ct. No. 7846719) (Filed May 29, 2002)

Plaintiff appeals from a dismissal following a grant of summary judgment on motion of defendants Alan Riffer, Diane McNenny, Marsha Skinner, and Peggy Thomsen. Plaintiff also appeals from the order awarding costs. We affirm.

Background

The salient facts are undisputed. Defendants, members of the board of the Albany Unified School District (District), were present at a public meeting held on the evening of April 30, 1996. Plaintiff addressed the board about various subjects, one of which was the volume of trash in the vicinity of the high school. What transpired next is described in plaintiff's opening brief.[1]

[1] We omit Plaintiff's record citations.

"To illustrate his point, he [plaintiff] spread out a drop cloth . . . , displayed a bag of trash which he himself had collected near the school, and indicated by his actions that he was going to dump the contents on the drop cloth to show the board the nature of the trash." Although plaintiff left it unsaid in his brief, he admitted in papers opposing summary judgment that he did empty the contents of the bag on the drop cloth.

"At that point a board member told Superintendent Hudson, 'Mr. Hudson, will you call the police, because this is an absolutely inappropriate activity to do . . . in a schoolroom, because. . . . ' The board then moved, seconded and voted to adjourn the meeting, and Superintendent Hudson and the board members got up and filed out of the room while Hudson called the police.

"While waiting for the police, plaintiff turned to face the audience and he and the audience engaged in a conversation about possible ways to resolve the trash problem, and the school officials' indifference to the problem.

"Several minutes later, the police arrived. Plaintiff was still at the front of the room, facing away from the microphone, still talking with the audience, with his bag of trash spread out behind him on the tarp.

"Hudson and [board member] McManus told the police that before they arrived plaintiff had refused to give up the microphone . . . and the police told Hudson that if that was what had happened, then McMahon might be guilty of disrupting a public meeting. They explained to Hudson, as they are required to do in accordance with their police department's practices whenever a citizen is adamant that an arrest be made, as Hudson was, how a citizen's arrest is made.

"Hudson thereupon made a citizen's arrest of [plaintiff] on charges of willfully disturbing or breaking up a public meeting. (Pen. Code, § 403.) The police then received plaintiff into custody by going . . . up to plaintiff where he was speaking, handcuffing him, and leading him out of the building, and taking him to jail. The Board then 'reconvened' the adjourned meeting. After a few hours in jail [plaintiff] was 'cited out,' and released. No charges were filed against him."

Plaintiff sued seeking damages from the district, the City of Albany, Superintendent Hudson, and the members of the board. With respect to the individual defendants/respondents, plaintiff alleged causes of action for "false imprisonment/false arrest," malicious prosecution, and "interference with Constitutional Rights" (citing Civil Code section 52 and 52.1). He also sought a judicial declaration that "Defendants' actions in adjourning the Board Meeting when plaintiff was . . . criticizing their policies relating to trash and public safety, and going into closed session and arranging for the arrest of plaintiff, effecting the arrest of plaintiff, and then resuming the Board Meeting after plaintiff's criticism could no longer be heard, was a violation of the Brown Act [Gov. Code, § 54950.5 et seq.]."

All of the named defendants except the City of Albany moved for summary judgment. The trial court denied the motion as to the District, Superintendent Hudson, and board member McManus on the false arrest and imprisonment causes of action, ruling that there was a triable issue of material fact "whether these defendants authorized, assisted, encourage [sic] or directed police to unlawfully arrest plaintiff." The motion was otherwise granted.

It was not until a jury returned a verdict for the remaining defendants that a judgment was entered. Plaintiff then perfected this timely appeal.

Review

Plaintiff does not challenge the ruling on his cause of action for malicious prosecution. We examine the ruling on the other causes of action.

The Cause of Action for False Arrest and False Imprisonment

Although Plaintiff does not explicitly abandon his claim for false imprisonment, the only arguments he advances deal with whether he was falsely arrested. While the point is largely academic, only false imprisonment is recognized as a civil cause of action. An arrest always involves restraint. Thus a suit for false imprisonment automatically embraces the wrongful arrest. (*Moore v. City & County of San Francisco* (1970) 5 Cal.App.3d 728, 735; see *Cummings v. Fire Ins. Exchange* (1988) 202 Cal.App.3d 1407, 1422; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 378, pp. 463-464.) "The crime of false imprisonment is defined by Penal Code section 236 as the 'unlawful violation of the personal liberty of another.' The tort is identically defined" and "consists of the '"nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short."' [Citation.]" (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715.)

"A private person may make a 'citizen's arrest' for a public offense committed in his presence. (P.C. 837(1).) However, the cooperation of police officers is necessary to

make the arrest effective. The citizen calls the police; they are unable to make an arrest because the offense was previously committed outside their presence; but the citizen may make the arrest and the officers will then take the arrested person into custody." (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 390, p. 473, italics omitted.) That procedure was followed here.

We need not discuss at length plaintiff's allegation of collusion among the defendants. Even if the evidence was sufficient to raise a triable issue on that score, plaintiff still had to bring forth evidence that his arrest was illegal. This he was unable to do.

He was arrested for violating Penal Code section 403, which provides in pertinent part: "Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting that is not unlawful in its character . . . is guilty of a misdemeanor." Our Supreme Court has held that a *conviction* under this statute requires proof "that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known." (*In re Kay* (1970) 1 Cal.3d 930, 943.)

It bears emphasis that plaintiff's arrest for violating section 403 required only probable cause, not proof sufficient for conviction: "Reasonable or probable cause for an arrest . . . has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime. [Citations.] Probable cause has also been defined as having more

evidence for than against; supported by evidence that inclines the mind to believe, but leaves some room for doubt. [Citation.] It is not limited to evidence that would be admissible at the trial on the issue of guilt. [Citation.] The test is not whether the evidence upon which the officer acts in making the arrest is sufficient to convict but only whether the person should stand trial. [Citation.]" (*People v. Ingle*(1960) 53 Cal.2d 407, 412-413.)

Moreover, "[w]hat is probable cause ... is not a question of fact for the jury, but one of law for the court, to be decided in accordance with the circumstances at the time of the detention, unhampered by the outcome of the charge against the plaintiff of the public offense or by the conclusions of the trial court." (*Collyer v. S. H. Kress & Co.* (1936) 5 Cal.2d 175, 181.) The issue of probable cause is therefore appropriately resolved by summary judgment. (*Giannis v. City and County of San Francisco* (1978) 78 Cal.App.3d 219, 224-225.) Although not addressed by the court in its order, the issue of probable cause furnishes a separate and independent ground for affirmance. The issue was argued by defendants below. Relevant evidence produced by the parties is not in dispute, and thus our review is de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

The uncontradicted evidence shows that the board was conducting a public meeting in a school cafeteria. Plaintiff came to the podium and began speaking about trash conditions. To "underscore" his point he produced a bag full of trash and informed the board he was going to empty the bag on the floor. Plaintiff told the board the bag contained drug paraphernalia and alcohol bottles along with other refuse. Plaintiff was told that dumping the trash would be "absolutely inappropriate," yet he ignored a

request not to do so. Members of the board and others present deemed this a disruption of the meeting and were afraid that the trash might include material that posed a threat to the health and safety of students subsequently using the cafeteria. When insisting that plaintiff be taken into custody, Superintendent Hudson had ample probable cause to believe plaintiff had violated Penal Code section 403, by conduct leading to the temporary termination of the public hearing. There was thus a reasonable basis for Hudson to conclude that plaintiff had "substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages . . . for governance of the meeting, of which he knew. . . . " (*In re Kay, supra*, 1 Cal.3d at p. 943.) This conclusion appears as a matter of law. (See, e.g., *Gomez v. Garcia* (1980) 112 Cal.App.3d 392; *Giannis v. City and County of San Francisco, supra*, 78 Cal.App.3d 219; *White v. Martin* (1963) 215 Cal.App.2d 641.) The ultimate conclusion is from our Supreme Court: "Imprisonment pursuant to a lawful arrest is not tortious." (*Peterson v. Robison* (1954) 43 Cal.2d 690, 696.)

The Cause of Action for Interference with Civil Rights

Civil Code sections 52 and 52.1 provide remedies for instances in which "a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise of enjoyment by any individual or individuals of rights secured by the Constitution or laws of this state. . . . " (See also Civ. Code, § 51.7.) These and other statutes were enacted by the Legislature in a coordinated effort to combat hate crimes.

(See *Jones v. KMart Corp.* (1998) 17 Cal.4th 329, 338.) Courts have read section 52.1 in conjunction with Civil Code section 51.7, subdivision (a) which provides in pertinent part: "All persons within the jurisdiction of this state have the right to be free from violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. . . . " (*Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 111; *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797, 1809.)

With respect to plaintiff's "4th cause of action for violation of constitutional rights under Civil Code [sections] 52 and 52.1," the court concluded that plaintiff failed "to raise a triable issue of material fact whether he was discriminated against or threatened based on his political affiliation or his exercise of constitutional rights." Plaintiff calls this error. We do not.

Plaintiff's arrest and subsequent brief confinement was not a hate crime; indeed it was no crime at all. Insofar as plaintiff equates the adjournment of the public meeting with infringement upon his First Amendment right of free speech, the inescapable fact is that plaintiff's own conduct caused the adjournment of the meeting. It was not the content of his views that caused the adjournment, but rather his dumping of potentially hazardous trash in a school cafeteria that caused concern for student safety. "The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (*Greer v. Spock* (1976) 424 U.S. 828, 836, quoting *Adderly v. Florida* (1966)

385 U.S. 39, 48.) The United States Supreme Court has also stated that "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." (*Adderly v. Florida*, *supra*, at p. 48.) The response to plaintiff's disruptive behavior did not violate the Constitution, and thus is beyond the scope of Civil Code sections 51.7 and 52.1.

The Cause of Action for Declaratory Relief

With regard to plaintiff's cause of action for declaratory relief the court found that "all matters giving rise to this complaint are past acts to which declaratory relief is inappropriate. See . . . *Baldwin v. Marina City Properties* (1978) 79 Cal.App.3d 393, 407." Plaintiff contends that *Baldwin* is distinguishable because it involved a commercial dispute between private parties, and that the relevant statutes governing declaratory relief as against a governmental entity were subsequently changed. Both parts of plaintiff's argument may be conceded. *Baldwin* is indeed distinguishable, and, more importantly, since 1993 the Brown Act has authorized "any interested party [to] commence an action by . . . declaratory relief . . . to determine the applicability of this chapter to actions or threatened future action of the legislative body. . . . " (Gov. Code, § 54960, subd. (a).) These concessions do not, however, either demonstrate that error occurred or that reversal is required. "Because our review is de novo if summary judgment was proper, even if granted for an incorrect reason, we affirm" (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 39; accord, *Kahn v. East Side Union High School Dist.* (2002) 96 Cal.App.4th 781, 788.)

A trial court may decline to grant declaratory relief when "its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061.) Such a decision is a matter for the trial court's discretion, which is reversible only for abuse (e.g., *Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 448), and which can be exercised on a motion for summary judgment. (*Travers v. Louden* (1967) 254 Cal.App.2d 926, 932.) The trial court's conclusion that declaratory relief would be "inappropriate" is consistent with the court's determination that such relief was superfluous to the resolution of the underlying merits already reached. (See *California Ins. Guarantee Assn. v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623-1624 .) The chance that the relevant conduct would recur can properly be regarded as remote, thus the grant of relief was unnecessary in the context of litigation the court was simultaneously ending. This conclusion cannot be characterized as an abuse of discretion.

Plaintiff's appeal from the cost order is predicated upon his appellate success. Because that predicate did not come to pass, the cost order is affirmed.

Disposition

The grant of summary judgment and order of dismissal are affirmed. Defendants shall recover their costs of appeal.

Corrigan, J.

We concur:

McGuiness, P.J.

Pollak, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DAVID McMAHON, Plaintiff v. ALBANY UNIFIED SCHOOL DISTRICT, et al. Defendants.	) Case No. 784671-9)) ORDER REGARDING) DEFENDANTS' MOTION) FOR SUMMARY JUDG-) MENT, OR IN THE) ALTERNATIVE, SUM-) MARY ADJUDICATION)) Date: May 21, 1999) Time: 9 a.m.) Dept.: 31

On May 21, 1999, the Court heard the motion for summary judgment, or in the alternative, summary adjudication, by defendants Albany Unified School District, Edward James McManus, Joe Dale Hudson, Alan Riffer, Dianne McNenny, Marsha Skinner and Peggy Thomsen. The parties appeared at the hearing through counsel of record. The Court, having considered all papers in support of and in opposition to the motion and the oral arguments of counsel, hereby issues the following ruling on defendants' motion for summary adjudication:

Issue 1 (regarding 3rd cause of action for malicious prosecution) – GRANTED as to all defendants, pursuant to Government Code 821.6. See separate statement of facts #1-16, particularly #15-16; plaintiff's response, and evidence in support.

Issue 2 (regarding 1st cause of action for false arrest/imprisonment) – GRANTED as to defendants Riffer, McNenny, Skinner, and Thomsen. Plaintiff fails to raise a triable issue of material fact whether these defendants

authorized, assisted, encouraged or directed police to arrest plaintiff. See separate statement of facts #1-12 and #17-22, plaintiff's response, and evidence in support. DENIED as to defendants Albany Unified School District, McManus, and Hudson. Plaintiff raises a triable issue of material fact whether these defendants authorized, assisted, encouraged or directed police to unlawfully arrest plaintiff. See particularly separate statement of facts #3, 7, 8 11, 12, 17-22; plaintiff's response; plaintiff's additional fact #53, and evidence in support

Issue 3 (regarding 5th cause of action for declaratory relief pursuant to Government Code 54950.5) – GRANTED as to all defendants. The court finds that all matters giving rise to this complaint are past acts to which declaratory relief is inappropriate. See separate statement of facts #1-12 and 23, plaintiff's response, plaintiff's additional fact #51 and 54, and evidence in support. See also *Baldwin v. Marina City Properties* (1978) 79 Cal.App.3d 393, 407.

Issues 4 and 5 (regarding 4th cause of action for violation of constitutional rights under Civil Code 52 and 52.1) – GRANTED as to all defendants. Plaintiff fails to raise a triable issue of material fact whether he was discriminated against or threatened based on his political affiliation or his exercise of constitutional rights. See separate statement of facts #1-12 and 24-31, plaintiff's response, plaintiff's additional facts #32-50, and evidence in support.

Motion for summary judgment is GRANTED as to defendants Riffer, McNenny, Skinner, and Thomsen, and DENIED as to defendants Albany Unified School District, McManus, and Hudson, for reasons set forth above.

The court considered only admissible and competent evidence pursuant to *Biljac v. First Interstate Bank* (1900) 218 Cal.App.3d.

IT IS SO ORDERED.

Dated: May 21, 1999

AND PRESENTED
FOR SIGNATURE AND
SIGNED JUN 21 1999

HENRY E. NEEDHAM, JR.
Judge HENRY E.
NEEDHAM, JR.

PURSUANT TO C.C.P. 635

for Hon. JACQUELINE TABER, judge.

S108419

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DAVID MCMAHON, Petitioner

v.

FIRST APPELLATE DISTRICT COURT OF APPEAL,
Respondent;

ALBANY UNIFIED SCHOOL DISTRICT,
Real Party in Interest.

(Filed Aug. 14, 2002)

Petition for writ of mandate/prohibition DENIED.

GEORGE
Chief Justice

Court of Appeal, First Appellate District,
Division Three – No. A094883
S108213

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DAVID MCMAHON, Plaintiff and Appellant,

v.

ALAN RIFFER, et al., Defendants and Respondents.

(Filed Aug. 14, 2002)

Petition for review DENIED.

GEORGE
Chief Justice

Supreme Court, U.S.
FILED
DEC 13 2002
CLERK

No. 02-743

In the

Supreme Court of the United States

DAVID McMAHON,

Petitioner,

v.

ALBANY UNIFIED SCHOOL DISTRICT, JOE DALE HUDSON, ALAN RIFFER, DIANNE McNENNY, MARSHA SKINNER, and PEGGY THOMSEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

RESPONDENTS' BRIEF IN OPPOSITION

Terry G. Tadlock
Counsel of Record
Imai, Tadlock,
Keeney & Cordery, LLP
185 Berry Street
Suite 4300
San Francisco, CA 94107
(415) 537-3930
Attorneys for Respondents

CURRY & TAYLOR ♦ (202) 393-4141 ♦ HTTP://USSCINFO.COM

PARTIES TO THE PROCEEDINGS

The Albany Unified School District is a public entity operating in the City of Albany, County of Alameda, State of California. Respondents Alan Riffer, Dianne McNenny, Marsha Skinner and Peggy Thomsen were publicly elected members of the governing board of the Albany Unified School District. Respondent J. Dale Hudson, the then Superintendent of Schools, was an employee of the Albany Unified School District.

In addition to the parties listed by Petitioner, one additional party warrants mention. Edward McManus was also a publicly elected member of the governing board of the Albany Unified School District and a defendant in the trial court proceedings below. McManus was granted a non-suit by the trial court with judgment entered thereon. Petitioner did not appeal the judgment entered in favor of McManus. Accordingly, the petition does not raise any issue with respect to McManus and he is properly omitted from the list of respondents.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDINGS i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE WRIT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

GALANTY V. PAUL REVERE LIFE INSURANCE COMPANY (200) 23 CAL. 4TH 368, 374 2

GUZ V. BECHTEL NATIONAL, INC., (2000) 24 CAL.4TH 317, 334 2

PAZ V. STATE OF CALIFORNIA (2000) 22 CAL. 4TH 550, 557 2

STATUTES

CALIFORNIA PENAL CODE SECTION 403 4

REASONS FOR DENYING THE WRIT

Petitioner asserts the Court of Appeal decided his case on the basis of an issue not briefed or argued by the parties, without first giving notice and opportunity to brief the issue. This is an erroneous presentation of the facts. The primary question presented by the petition ignores the standard of review applied by the California Court of Appeal in its review of the trial court decision granting Respondents motion for summary judgment.

Petitioner's appeal from the trial court's decision granting the motion for summary judgment correctly identified the standard of review as being de novo. The California Court of Appeal reviewed the evidence de novo and was not, as Petitioner now claims, restricted to the issues identified by Petitioner in his appellate brief. Accordingly, the decision of the California Court of Appeal was proper in all respects and Respondents urge this Honorable Court to deny the Petition for Writ of Certiorari.

I
THE APPLICABLE STANDARD IS DE NOVO REVIEW OF THE EVIDENCE BY THE COURT OF APPEAL

The trial court granted summary judgment in favor of Respondents. Petitioner appealed to the California Court of Appeal. The Court of Appeal affirmed the trial court decision. (Petition for Writ of Certiorari, Appendix 1 - 11)

In his brief filed with the Court of Appeal Petitioner identified the standard of review as follows: "The granting or denial for a motion of summary

judgment is subject de novo review. (Paz v. State of California (2000) 22 Cal. 4th 550, 557) The Appellate Court reviews the moving papers independently to determine whether there is a triable issue as to a material fact and whether the moving party is entitled to judgment as a matter of law. (Galanty v. Paul Revere Life Insurance Company (200) 23 Cal. 4th 368, 374.)" (Appellant's Brief, page 9)

More precisely, in Paz v. State of California, (2000) 22 Cal. 4th 550, 557, the California Supreme Court held that on review of a trial court decision granting a motion for summary judgment "We review the trial court's decision de novo, *considering all of the evidence the parties offered in support of and against the motion*, and the uncontradicted inferences reasonably deducible from the evidence, except that to which the court sustained objections." (Emphasis added)

In the instant case, the Court of Appeal followed the instruction of the California Supreme Court and reviewed the trial court's decision granting summary judgment de novo. The Court of Appeal said "Although not addressed by the court in its order, the issue of probable cause furnishes a separate and independent ground for affirmance. *The issue was argued by defendants below.* Relevant evidence produced by the parties is not in dispute, and therefore, ***our review is de novo***." (Petition for Writ of Certiorari, Appendix 6) (Emphasis added) In support of its position, the Court of Appeal cited Guz v. Bechtel National, Inc., (2000) 24 Cal.4th 317, 334; 8 Pacific 3rd 1089, 1099 which provides "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all of the evidence set forth in the moving and opposition papers except that to which objection has been made and sustained".

Accordingly, review by the California Court of Appeal in the instant case was not limited to issues briefed or argued by the parties on appeal; rather, it was incumbent upon the court to review de novo the moving and opposition papers and independently consider all of the evidence the parties offered in support of and against the motion. The Court of Appeal did exactly this in affirming the decision of the trial court.

II
STATEMENT OF FACTS

A regularly scheduled Albany Unified School District Board of Education meeting was held on the evening of April 30, 1996. The meeting was conducted in the multi-purpose/cafeteria room located at Cornell Elementary School. Over a period of two weeks prior to this meeting Petitioner collected trash and garbage, including alcohol bottles and drug paraphernalia, in 13 gallon plastic bags. He bought at approximately five such bags of this trash to the meeting of the Board of Education.

At the meeting, Petitioner sought to address the Board of Education on issues not on the agenda, including earthquake safety, traffic and trash. Over protest by the site administrator/principal and at least one member of the board, Petitioner emptied the contents of at least one 13 gallon trash bag partially onto a tarp and on to the floor of the cafeteria in front of the members of the board. Petitioner admitted this trash contained alcohol bottles and drug paraphernalia. Petitioner wore at least one glove when he handled and dumped out the trash onto the floor at the April 30, 1996 meeting.

The board members concluded Petitioner's conduct in dumping the trash on to the floor caused a serious disruption of the meeting. Former defendant and board member McManus felt the meeting was out of control and Petitioner's conduct concurrently posed a safety threat to those present at the meeting and the children who would attend the school and eat in the building the next day. The Board adjourned and recessed the meeting until order could be restored. Former Superintendent Hudson summoned the police.

Petitioner continued to speak to those persons present until the police arrived. When the police officers arrived one officer informed former Superintendent Hudson if he (Hudson) wished to have the Petitioner removed from the room it would be necessary to place him under citizen's arrest. Former Superintendent Hudson agreed to do so and signed a citizen's complaint form presented to him by an Albany police officer indicating that former Superintendent Hudson was arresting Petitioner for a violation of California Penal Code Section 403, disturbing a public meeting.

After the Petitioner was escorted from the building, the meeting resumed and continued without incident.

Petitioner thereafter filed a verified amended complaint on March 9, 1999 alleging false arrest, malicious prosecution, violation of constitutional rights, and requesting declaratory relief. The Albany Unified School District, Hudson, Riffer, McNenny, Skinner, Thomsen and McManus answered and thereafter sought summary judgment and/or summary adjudication of issues. The trial court granted summary judgment in favor of Riffer, McNenney, Skinner and Thomsen as to all causes of action/counts and granted summary

adjudication of issues in favor of the Albany Unified School District, Hudson and McManus on all causes of action/counts except that for false arrest.

Petitioner thereafter proceeded to trial against the Albany Unified School District, Hudson and McManus during which McManus, on motion, was granted a judgment of nonsuit. The trial continued against the Albany Unified School District and former Superintendent Hudson until the jury failed to reach a verdict. Following declaration of a mistrial, a new trial date was scheduled. Appellant then proceeded with the second trial against only the Albany Unified School District and former Superintendent Hudson. That trial ended with a jury verdict in favor of the Albany Unified School District and former Superintendent Hudson.

Appellant appealed from the summary judgment in favor of Riffer, McNenny, Skinner and Thomsen. The Court of Appeal affirmed the trail court decision. The California Supreme Court then denied both Petitioner's petition for a writ of mandamus and petition for review. Each of these decisions appear in the Appendices to the Petition for Writ of Certiorari.

II
CONCLUSION

Petitioner appealed the trial court's decision granting Respondents motion for summary judgment. In doing so, Petitioner correctly identified the standard of review by the California Court of Appeal as one of de novo review of the evidence. The Court of Appeal reviewed the evidence de novo and affirmed the trial court's judgment. Thereafter, Petitioner unsuccessfully sought relief from the California Supreme Court. Petitioner now seeks to apply a different spin to the

issue and asks this court to ignore the standard of de novo review that has been long standing and repeatedly articulated by California courts. For all of the reasons herein stated, Respondents respectfully request that this Honorable Court deny this petition.

Respectfully submitted,

T.G. Tadlock
Counsel of Record
Imai, Tadlock, Keeney & Cordery, LLP
185 Berry Street
San Francisco, CA 94107
(415) 537-3930
Attorneys for Respondents

No. 02-743

Supreme Court, U.S.
FILED
JAN 6 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID McMAHON,

Petitioner,

v.

ALBANY UNIFIED SCHOOL DISTRICT, JOE DALE HUDSON, ALAN RIFFER, DIANNE McNENNY, MARSHA SKINNER, and PEGGY THOMSEN,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER K. PYLE
Counsel of Record
2039 Shattuck Avenue,
Suite 202
Berkeley, CA 94704-1116
(510) 849-4424

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

DUE PROCESS OF LAW REQUIRES THAT AN APPELLATE COURT GIVE THE PARTIES NOTICE AND AN OPPORTUNITY TO BE HEARD ON AN OUTCOME-DETERMINATIVE ISSUE IN THE CASE. IT IS IRRELEVANT TO THAT PARTICULAR DUE PROCESS PRINCIPLE WHETHER THE RECORD SUPPORTS THE APPELLATE COURT'S DECISION.

We argued in our petition for certiorari that the California Court of Appeal decided the case on an issue that was not briefed or argued by the parties.

Respondents deny that the California Court of Appeal did this at all. They claim that as long as the California appellate court reviewed the summary judgment order *de novo*, the court was not "restricted to the issues identified by Petitioner in his appellate brief." Respondents' Brief in Opposition, p. 1.

The reasoning behind respondents' argument is not clear, to say the least. Presumably, *any* case that an appellate court decides on an unbriefed issue contains support in the record for the decision. Otherwise the due process argument would be not that the case was decided on an issue which was not briefed or argued, but that there was no support in the record for the court's decision.

We do not dispute the principle that summary judgment orders are reviewed *de novo*. It is a rule of universal application, because the question on summary judgment is whether the proponent has, as a matter of law, established his or her position. If the issue is a matter of law, then it is not surprising that the standard of review is *de novo*.

But the question which arises in the mind of one who reads respondents' opposition is, what does the standard of review have to do with the case at hand? The issue of the legality of the arrest was not ruled upon, or even mentioned, in the trial court's summary judgment order; hence, the appellate court's "review" of the trial court's order was not a "review" of that issue. That issue was never *determined* by the trial court.

In *Cole v. Arkansas*, 333 U. S. 196 (1948), which we cited in our petition, the defendants were tried and convicted of violating § 2 of a state statute, and they argued on appeal that the statute was unconstitutional. The state supreme court did not address that issue, but instead ruled that the record showed a violation of § 1 of the statute. This court did not look to whether the record contained sufficient evidence to support the finding of such an alternate violation; rather, the question was whether the defendants were entitled to have their appeal appraised "as the issues were determined in the trial court." *Id.* at 202.

When an appellate court decides an issue without telling the parties that it considers the issue to be determinative of the outcome of the case, it means that one of the parties will be deprived of his rights without ever having the opportunity to defend against the appellate court's judgment.

Such a procedure is contrary to due process of law.

Respectfully submitted,

WALTER K. PYLE
2039 Shattuck Avenue,
Suite 202
Berkeley, CA 94704-1116
(510) 849-4424

Attorney for Petitioner